

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

Sep 29, 2021

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,  
exs rel. UPPI, LLC; and UPPI, LLC,  
qui tam as Relator,

Plaintiffs-Relators,

v.

CARDINAL HEALTH, INC;  
CARDINAL HEALTH 414, LLC,  
doing business as Cardinal Health  
Nuclear Pharmacy Services;  
CARDINAL HEALTH 200, LLC;  
D'S VENTURES, LLC, doing  
business as Logmet Solutions, LLC;  
CARING HANDS HEALTH  
EQUIPMENT & SUPPLIES, LLC;  
OTHER UNNAMED SMALL  
BUSINESS FRONT COMPANIES;  
OBIE B. BACON; DEMAURICE  
SCOTT; and UNNAMED  
INDIVIDUALS (Does),

Defendants.

NO: 2:17-CV-378-RMP

ORDER GRANTING  
DEFENDANTS' MOTIONS TO  
DISMISS

BEFORE THE COURT, without oral argument, are Motions to Dismiss

Plaintiff-Relator UPPI, LLC's ("UPPI's" or "Relator's") First Amended Complaint

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS ~ 1

1 (“FAC”) for Failure to State a Claim from Defendants Caring Hands Health  
2 Equipment & Supplies, LLC and Obie Bacon, ECF No. 58; Defendants Cardinal  
3 Health, Inc., Cardinal 414, LLC, and Cardinal Health 200, LLC (collectively,  
4 “Cardinal Health”), ECF No. 59; and Defendants D’s Ventures LLC d/b/a Logmet  
5 Solutions, LLC (“Logmet”) and DeMaurice Scott, ECF No. 61.

6 The Court has reviewed the parties’ briefing and attached exhibits, the United  
7 States’ Statement of Interest, ECF No. 67, the remaining docket, the relevant law,  
8 and is fully informed.

## 9 BACKGROUND

### 10 *Factual Context*

#### 11 Parties and Contracting Preferences

12 Relator UPPI, LLC (“UPPI”) is a membership organization that is composed  
13 of individual, small business, and university-based pharmacies engaged in the  
14 business of radiopharmaceuticals. *See* ECF No. 36 (FAC) at 7–8. UPPI is a limited  
15 liability company, organized under the laws of Delaware, with its principal place of  
16 business in Georgia. *Id.* at 7. According to the FAC, the Cardinal Health  
17 Defendants all have a principal place of business in Dublin, Ohio. *Id.* at 8–9.  
18 Defendant Caring Hands allegedly has a principal place of business in Ridgeland,  
19 South Carolina, and Defendant Obie Bacon is its owner and CEO. *Id.* at 9–10.  
20 Defendant Logmet allegedly has its principal place of business in Georgia, and  
21 Defendant DeMaurice Scott is its owner and CEO. *Id.* at 10.

1 In this *qui tam* action, UPPI has brought claims against Defendants Cardinal  
2 Health, Caring Hands, Logmet, Obie Bacon, DeMaurice Scott, and unnamed  
3 individuals (“Does”) under the False Claims Act (“FCA”), 31 U.S.C. §§ 3729-33.  
4 UPPI alleges, generally, that since approximately 2013 Defendants have “conspired  
5 to fraudulently obtain lucrative Government contracts to supply radiopharmaceutical  
6 products to hospitals and pharmacies, including those operated by” the United States  
7 Department of Veterans Affairs (the “VA”). ECF No. 36 at 3.

8 The Small Business Administration allegedly has certified Defendant Caring  
9 Hands, through Mr. Bacon, and Defendant Logmet, through Mr. DeMaurice, as  
10 Service-Disabled Veteran Owned Small Businesses (“SDVOSBs”), Veteran-Owned  
11 Small Businesses, and Minority-Owned Small Businesses. ECF No. 36 at 10.  
12 According to Plaintiff’s FAC, the Cardinal Health Defendants are not SDVOSBs.  
13 *See id.* at 5–6.

14 The Government gives preferential treatment to small businesses, and certain  
15 subcategories of small businesses receive a greater degree of preference than small  
16 businesses generally. ECF No. 36 at 3–4. “[F]or VA contracts especially,”  
17 SDVOSBs “receive the most preferential treatment of all.” *Id.* at 4. Specifically,  
18 since 2006, VA contracting officers are required to restrict competition to SDVOSBs  
19 so long as the contracting officer reasonably expects that at least two SDVOSBs will  
20 bid on a contract and that the award can be made at a fair and reasonable price that  
21 offers best value to the United States. *Id.* at 13 (citing 38 U.S.C. § 8127(d)). To

1 determine whether the bidding process will be restricted to SDVOSBs, VA  
2 contracting officers conduct initial market research. *Id.* at 15.

### 3 Supply Contracts

4 UPPI takes issue in its FAC with the formation and execution of supply  
5 contracts between the VA and the Caring Hands and Logmet Defendants (the  
6 “SDVOSB Defendants”) to purchase radiopharmaceutical products for seven VA  
7 medical facilities beginning in approximately 2014. ECF No. 36 at 24–26.

8 The VA issued solicitations for bids on contracts to supply VA medical  
9 facilities with radiopharmaceutical products, meaning medical products that contain  
10 radioactive material and are used for either diagnostic or therapeutic purposes. ECF  
11 No. 36 at 3, 20. The solicitations were set aside specifically for SDVOSBs or were  
12 otherwise not subject to open competition. *See id.* at 24–26, 50.

13 Radiopharmaceuticals have a short shelf life, are highly regulated by the  
14 Nuclear Regulatory Commission (“NRC”) and other agencies, and are compounded  
15 in nuclear pharmacies by nuclear pharmacists who must satisfy strict licensure  
16 requirements. *Id.* at 18–20. The VA solicitations contained a wide range of  
17 technical requirements “for contractors furnishing radiopharmaceutical products and  
18 services,” including specialized nuclear licenses for possessing, compounding, and  
19 distributing radiopharmaceutical products; removal specifications for hazardous  
20 waste, along with the accompanying specialized licenses; and a proximate nuclear  
21

1 pharmacy able to take and fill daily orders and deliver them within hours of  
2 compounding. *See* ECF No. 36 at 17–18, 28–30.

3 Defendant Caring Hands allegedly employs only ten employees, does not hold  
4 nuclear licenses, and does not operate nuclear pharmacies. ECF No. 36 at 31–32.  
5 Defendant Logmet allegedly operates from a single-family residence and a rental  
6 unit in an office complex, both in Georgia, does not hold nuclear licenses, and does  
7 not operate nuclear pharmacies. *Id.* at 32–33.

8 UPPI alleges that the SDVOSB Defendants, through either explicit or implicit  
9 representations, concealed that they were unable to perform the requirements in the  
10 VA’s solicitation and in fact lacked the necessary licensure, personnel, training,  
11 delivery infrastructure, and other technical requirements of the contracts. *See* ECF  
12 No. 36 at 31–33.

13 UPPI acknowledges that the SDVOSB Defendants “sometimes mentioned  
14 Cardinal in their bids,” by including Cardinal Health’s NRC license or disclosing  
15 that Cardinal Health would be a supplier. ECF No. 36 at 34. However, UPPI  
16 alleges that the SDVOSB Defendants were dishonest even in disclosing Cardinal  
17 Health’s involvement in the contracts because the SDVOSB Defendants allegedly  
18 “never disclosed the extremely limited role they intended to play” and instead  
19 “stated that they would be acting as authorized distributors, or something similar,  
20 implying that they would be taking possession of and delivering radiopharmaceutical  
21 products to the Government.” *Id.*

1           Between 2013 and 2016, the VA awarded eight contracts to the SDVOSB  
2 Defendants for supply of radiopharmaceuticals to seven VA facilities, in Durham,  
3 North Carolina; Columbia, South Carolina; Miami, Florida; Birmingham, Alabama;  
4 San Antonio, Texas; Denver, Colorado; and Albuquerque, New Mexico. ECF No.  
5 36 at 24–25. UPPI alleges that those contracts either contained, or should have  
6 contained by statute, a limitation against subcontracting “that would have precluded  
7 the SDVOSB Defendants from allowing Cardinal to perform the majority of the  
8 work, and receive the majority of the benefit, from the contract.” ECF No. 36 at 33.  
9 The Cardinal Health Defendants submitted the eight contracts at issue with their  
10 Motion to Dismiss, and UPPI does not dispute that the contracts are subject to  
11 judicial notice. *See* ECF Nos. 60-2–60-9; 66 at 20; *see also* Fed. R. Evid. 201.  
12 Three of the eight contracts, for the VA locations in Durham, Birmingham, and San  
13 Antonio, contained the subcontracting limitation. *See* ECF No. 66 at 20. UPPI  
14 maintains that by statute and regulation, SDVOSB set-aside contracts must contain a  
15 subcontracting limitation requiring “[a]ny concern submitting a bid or offer in its  
16 own name . . . that proposes to furnish an end product it did not manufacture” to  
17 “either ‘furnish[] in the performance of the contract, the product of a small business  
18 manufacturer or producer’ or obtain a waiver from the [Small Business  
19 Administration.]” ECF No. 66 at 22 (quoting 48 C.F.R. § 19.102(f)(1) (2011)).

20           UPPI alleges that after the contracts were awarded, the Government “ordered  
21 drugs from Cardinal, the SDVOSB Defendants billed the Government, and Cardinal

1 billed the SDVOSB Defendants slightly less than they had billed the Government.”  
2 ECF No. 36. UPPI alleges that this arrangement demonstrates that the SDVOSB  
3 Defendants “did almost no work on the contracts and added no value to the  
4 Government’s purchases, but instead acted solely as middlemen—and not even  
5 middlemen for products, but only for payments.” ECF No. 36 at 37.

### 6 ***Procedural History***

7 Relator UPPI filed its initial complaint on November 14, 2017. ECF No 1.  
8 The United States Attorney’s Office in this District investigated the allegations, and  
9 the United States declined to intervene in this case in May 2020. ECF Nos. 30; 67 at  
10 3. However, the United States remains a real party in interest. *See* ECF No. 67 at 2  
11 (citing *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 934  
12 (2009); *U.S. ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 720 (9th Cir.  
13 1994)). UPPI filed the operative FAC on August 25, 2020, in which UPPI alleges  
14 that Defendants violated the FCA: (1) when the SDVOSB Defendants presented  
15 false or fraudulent claims to the Government, and when the Cardinal Health  
16 Defendants caused the presentment of those claims; (2) when the SDVOSB  
17 Defendants made or used false records or statements material to their false or  
18 fraudulent claims, and when Cardinal Health caused that misconduct; and (3) when  
19 the SDVOSB Defendants and Cardinal Health conspired to commit these violations.  
20 ECF No. 36 at 12. Defendants seek to dismiss the FAC with prejudice. ECF No. 73  
21 at 28.

## LEGAL STANDARDS

### *Pleading and Dismissal Standards*

Complaints filed in federal court must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2).

When a defendant challenges a complaint’s sufficiency under Fed. R. Civ. P. 12(b)(6), the court must determine whether the complaint bears “sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

A claim is plausible when the plaintiff pleads “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. “In sum, for a complaint to survive a motion to dismiss, the non-conclusory ‘factual content,’ and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief.” *Moss v. United States Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009).

The Ninth Circuit has described plausibility as follows:

When faced with two possible explanations, only one of which can be true and only one of which results in liability, plaintiffs cannot offer allegations that are “merely consistent with” their favored explanation but are also consistent with the alternative explanation. Something more is needed, such as facts tending to exclude the possibility that the alternative explanation is true . . . in order to render plaintiffs’ allegations plausible within the meaning of *Iqbal* and *Twombly*.

*Petzschke v. Century Aluminum Co. (In re Century Aluminum Co. Sec. Litig.)*, 729 F.3d 1104, 1108 (9th Cir. 2013) (internal quotations omitted) (finding that the



1 plaintiffs’ allegations “remain[ed] stuck in ‘neutral territory’” because they did not  
2 tend to exclude the possibility that the defendants’ alternative explanation that  
3 excluded liability was true) (quoting *Twombly*, 550 U.S. at 557). The Ninth Circuit  
4 also has held that where plaintiff and defendant both advance plausible explanations  
5 for defendant’s actions, “Plaintiff’s complaint may be dismissed only when  
6 defendant’s plausible alternative explanation is so convincing that plaintiff’s  
7 explanation is *im* plausible.” *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011)  
8 (emphasis and word break in original).

9 A party must further plead claims under the False Claims Act, and any other  
10 cause of action based on alleged fraud or mistake, in satisfaction of the heightened  
11 pleading standard set forth in Fed. R. Civ. P. 9(b). *See Godecke ex rel. United States*  
12 *v. Kinetic Concepts, Inc.*, 937 F.3d 1201, 1208 (9th Cir. 2019). A plaintiff must  
13 allege the circumstances constituting fraud with enough particularity “to give the  
14 defendant notice of the particular misconduct so that it can defend against the  
15 charge.” *Id.* (citing *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir.  
16 2009)). The plaintiff “must allege the ‘who, what, when, where, and how’ of the  
17 misconduct.” *Id.*

18 A complaint sounding in fraud also must contain facts explaining why the  
19 statement was false when it was made. *See In re GlenFed, Inc. Sec. Litig.*, 42 F.3d  
20 1541, 1549 (9th Cir. 1994) (en banc), *superseded by statute on other grounds as*  
21 *stated in Adomitis ex. rel. United States v. San Bernardino Mountains Cmty. Hosp.*

1 *Dist.*, 816 F. App'x 64, 66 (9th Cir. 2020). “When there are multiple defendants in a  
2 case, ‘Rule 9(b) does not allow a complaint to merely lump multiple defendants  
3 together but requires plaintiffs to differentiate their allegations when suing more  
4 than one defendant and inform each defendant separately of the allegations  
5 surrounding his alleged participation in the fraud.’” *United States ex rel. Jones v.*  
6 *Sutter Health*, No. 18-CV-02067-LHK, 2021 U.S. Dist. LEXIS 156308, at \*10-11  
7 (N.D. Cal. Aug. 18, 2021) (quoting *Swartz v. KPMG LLP*, 476 F.3d 756, 764–65  
8 (9th Cir. 2007) (internal quotation in original omitted)). “The heightened pleading  
9 requirement of Rule 9(b) does not apply to allegations regarding defendant’s state of  
10 mind.” *Id.* at \*10. Therefore, general allegations of knowledge and intent are  
11 sufficient to state a claim. *See also* Fed. R. Civ. P. 9(b) (“Malice, intent, knowledge,  
12 and other conditions of a person's mind may be alleged generally.”).

13 A Rule 12(b)(6) dismissal “can be based on the lack of a cognizable legal  
14 theory or the absence of sufficient facts alleged under a cognizable legal theory.”  
15 *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

16 In deciding a motion to dismiss for failure to state a claim under Fed. R. Civ.  
17 P. 12(b)(6), a court “accept[s] factual allegations in the complaint as true and  
18 construe[s] the pleadings in the light most favorable to the nonmoving party.”  
19 *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).  
20 However, a court need not “assume the truth of legal conclusions merely because  
21

1 they are cast in the form of factual allegations.” *Fayer v. Vaughn*, 649 F.3d 1061,  
2 1064 (9th Cir. 2011) (per curiam) (internal quotation omitted).

### 3 DISCUSSION

#### 4 *Adequacy of the FAC*

5 As a preliminary matter, the Court notes that the Caring Hands Defendants  
6 initially argued for dismissal in part based on a contention that Relator had failed to  
7 join a necessary party, the VA, and that this case should be dismissed under Fed. R.  
8 Civ. P. 12(b)(7) for failure to join the VA under Fed. R. Civ. P. 19. ECF No. 58-1 at  
9 8. However, the Caring Hands Defendants withdrew that aspect of their Motion to  
10 Dismiss in their reply on the basis that the VA has sovereign immunity. *See* ECF  
11 No. 72 at 7. Therefore, the Court does not address dismissal under Fed. R. Civ. P.  
12 12(b)(7) any further.

13 Defendants move to dismiss for three primary reasons.<sup>1</sup> First, Defendants  
14 argue that Relator fails to plead falsity. *See* ECF No. 73 at 6. Defendants argue that  
15 Relator impermissibly fails to allege the content of any false statement at any stage  
16 in the contracting process and instead provides only conclusory, vague allegations  
17 that the SDVOSB Defendants made “implicit” or “false” representations that they  
18 could provide the radiopharmaceuticals on their own. ECF No. 59 at 29. Moreover,  
19 Defendants argue that Relator’s concessions that the SDVOSBs disclosed to the VA

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20  
21 <sup>1</sup> The Caring Hands, Logmet, and individual Defendants incorporate by reference  
the Cardinal Health Defendants’ reply. ECF Nos. 69 at 1; 72 at 7.

1 that Cardinal Health would supply the radiopharmaceuticals, and that the VA made  
2 daily orders directly with Cardinal Health, contradict Relator's unspecific allegations  
3 of falsity. *See* ECF No. 73 at 12. Second, Defendants allege that Relator fails to  
4 allege materiality with plausible or sufficiently particular facts and makes  
5 concessions that demonstrate that compliance with any limitation against  
6 subcontracting was not material to the VA. *See* ECF No. 73 at 26. Third, Cardinal  
7 Health disputes the element of scienter by arguing that it did not knowingly cause  
8 the SDVOSB Defendants to present any false statements or claims to the  
9 Government and that the FAC's conclusory allegations that Cardinal Health "'knew'  
10 the rules that applied to small business contracts to which it was not a party are  
11 plainly insufficient." ECF No. 73 at 6.

12 Relator maintains that the FAC adequately alleges the elements of an FCA  
13 claim to avoid dismissal. ECF No. 66 at 18–19. Relator argues that "the degree to  
14 which the Government actually knew of Cardinal's role vis-à-vis any given contract  
15 is a factual question that can only be determined after discovery. It is not a basis for  
16 holding that defendants were honest as a matter of law when the complaint alleges  
17 otherwise." *Id.* at 20. Relator continues that its FAC is sufficiently particular under  
18 Rule 9(b) because it identifies the specific contracts at issue for Relator's FCA  
19 claims, and the amounts paid under those contracts, as well as "sets forth the key  
20 contractual requirements; details the characteristics of the SDVOSB Defendants that  
21 made it impossible for them truthfully to certify their compliance with these

1 requirements; and provides examples of falsehoods by the SDVOSB Defendants.”

2 *Id.* at 32 (citing ECF No. 36 at 28–30; 35–37).

3 For its part the United States maintains that Relator’s consolidated response  
4 sets forth valid reasons to avoid dismissal, but the United States does not directly  
5 address any of Defendants’ arguments for dismissal under Federal Rules of Civil  
6 Procedure 12(b)(6) or 9(b). *See* ECF No. 67.

7 The FCA imposes liability for “those who present or directly induce the  
8 submission of false or fraudulent claims.” *Universal Health Servs, Inc. v. U.S. ex*  
9 *rel. Escobar*, 136 S. Ct. 1989, 1996 (“Enacted in 1863, the False Claims Act ‘was  
10 originally aimed principally at stopping massive frauds perpetrated by large  
11 contractors during the Civil War’”) (quoting *United States v. Bornstein*, 423 U. S.  
12 303, 309 (1976)); *see* 31 U.S.C. § 3729(a) (imposing civil liability on “any person  
13 who . . . knowingly presents, or causes to be presented, a false or fraudulent claim  
14 for payment or approval”).

15 Relator brings three causes of action in its FAC, pursuant to the following  
16 relevant text of the FCA:

17 (a) Liability for Certain Acts.

18 (1) In general. Subject to paragraph (2), any person who —

19 (A) knowingly presents, or causes to be presented, a false or  
fraudulent claim for payment or approval;

20 (B) knowingly makes, uses, or causes to be made or used, a false  
record or statement material to a false or fraudulent claim;

21 (C) conspires to commit a violation of subparagraph (A), (B), [or]  
(G);

...

1 (G) knowingly makes, uses, or causes to be made or used, a false  
2 record or statement material to an obligation to pay or transmit  
3 money or property to the Government, or knowingly conceals or  
4 knowingly and improperly avoids or decreases an obligation to  
5 pay or transmit money or property to the Government, is liable to  
the United States Government for a civil penalty of not less than  
\$5,000 and not more than \$10,000 . . . plus 3 times the amount of  
damages which the Government sustains because of the act of that  
person.

6 31 U.S.C. § 3729.

7 Count I of the FAC alleges that Defendants knowingly presented or caused to  
8 be presented false or fraudulent claims to the government in violation of subsection  
9 (a)(1)(A) (“presentment claim”). ECF No. 36 at 59; *see* 31 U.S.C. § 3729(a)(1)(A).

10 Count II of the FAC alleges that Defendants knowingly made, used, or caused a  
11 false record or statement material to a false or fraudulent claim in violation of  
12 subsection (a)(1)(B) (“false statement claim”). *See* ECF No. 36 at 60; *see* 31 U.S.C.  
13 § 3729(a)(1)(B). Count III of the FAC alleges that Defendants knowingly conspired  
14 to commit a violation of subsections (a)(1)(A) and (a)(1)(B), in violation of  
15 subsection (a)(1)(C) (“conspiracy claim”). *See* ECF No. 36 at 60; 31 U.S.C. §  
16 3729(a)(1)(C).

17 The Ninth Circuit has identified four essential elements that must be shown to  
18 prevail under the FCA pursuant to either section 3729(a)(1)(A) or (a)(1)(B): ““(1) a  
19 false statement or fraudulent course of conduct, (2) made with scienter, (3) that was  
20 material, causing (4) the government to pay out money or forfeit moneys due.””

21 *United States ex rel. Rose v. Stephens Inst.*, 909 F.3d 1012, 1017, 1020 (9th Cir.

2018) (quoting from *United States ex rel. Hendow v. University of Phoenix*, 461 F.3d 1166, 1174 (9th Cir. 2006)). The Court addresses the adequacy of Relator’s FAC according to Rule 9(b)’s heightened particularity requirement for each issue in turn. *See, e.g., United States ex rel. Totten v. Bombardier Corp.*, 286 F.3d 542, 551–52 (D.C. Cir. 2002) (holding that “because the False Claims Act is self-evidently an anti-fraud statute, complaints brought under it must comply with Rule 9(b)”).

### Falsity

The falsity requirement may be satisfied through a showing of express false certification, meaning that defendant falsely “certifies compliance with a law, rule or regulation as part of the process through which the claim for payment is submitted.” *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010).

Alternatively, a plaintiff may make an implied certification claim to satisfy the first element, in which case the plaintiff must satisfy two conditions:

First, the claim does not merely request payment, but also makes specific representations about the goods or services provided; and second, the defendant’s failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths.

*Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 2001 (2016); *see also Rose*, 909 F.3d at 1017, 1020 (determining that the four basic elements set out in *Hendow*, 461 F.3d at 1174, remain valid after the Supreme Court’s decision in *Escobar*, 136 S. Ct. 1989).

1 “Generally speaking, Rule 9(b) requires a plaintiff alleging fraud to: ‘1)  
2 specify the statements that the plaintiff contends were fraudulent; 2) identify the  
3 speaker; 3) state where and when the statements were made; and 4) explain why the  
4 statements were fraudulent.’” *U.S. ex rel. Polansky v. Pfizer, Inc.*, No. 04-CV-0704  
5 (ERK), 2009 U.S. Dist. LEXIS 43438, at \*10–11 (E.D.N.Y. May 22, 2009) (quoting  
6 *Rombach v. Chang*, 355 F.3d 164, 170 (2d Cir. 2004)). Dismissal is not appropriate  
7 where, accepting plaintiff’s factual allegations as true, the competing inferences  
8 advocated by defendant and plaintiff are both plausible. *Starr v. Baca*, 652 F.3d  
9 1202, 1216 (9th Cir. 2011). However, dismissal is appropriate where plaintiff offers  
10 only a “possible explanation” in the face of an “obvious alternative explanation.”  
11 *Integra Med. Analytics LLC v. Providence Health & Servs.*, 854 F. App’x 840, 844  
12 (9th Cir. 2021) (remanding to the district court for dismissal of plaintiff’s claims  
13 where the panel held, “We need not accept the conclusion that the defendant  
14 engaged in unlawful conduct when its actions are in line with lawful ‘rational and  
15 competitive business strategy.’” *Id.* (quoting *Twombly*, 550 U.S. at 554)) (emphasis  
16 in original).

17 Relator’s presentment and false statement FCA claims are based on an  
18 explanation that the SDVOSB Defendants, in collaboration with the Cardinal Health  
19 Defendants, fraudulently bid on and obtained radiopharmaceutical supply contracts  
20 by implying that the SDVOSB had the capacity to and would perform the contracts  
21 on their own while “knowing all the while that Cardinal would do the vast majority



1 of the work and receive almost all the revenue under the contract.” ECF No. 36 at  
2 5–6. However, combing through Relator’s FAC, the Court finds that the pleading is  
3 replete with speculative and conclusory statements about what Defendants or the VA  
4 “may” or “must” have known, but devoid of the specific “statements that the  
5 plaintiff contends were fraudulent,” the identity of the speaker, “where and when the  
6 statements were made,” or “why the [specific] statements were fraudulent.” *See*  
7 *U.S. ex rel. Polansky v. Pfizer, Inc.*, 2009 U.S. Dist. LEXIS 43438, at \*10–11; ECF  
8 No. 36.

9 Illustratively, the FAC alleges:

10 Notwithstanding their inability to perform the contracts, the SDVOSB  
11 Defendants bid as if they could perform. These bids included  
12 representations—at least implicit ones—that the SDVOSB Defendants  
13 were capable of performing the contracts (i.e., supplying the requested  
14 radiopharmaceuticals) in accordance with all of the applicable  
15 requirements, including restrictions on subcontracting that would have  
16 precluded the SDVOSB Defendants from allowing Cardinal to perform  
17 the majority of the work, and receive the majority of the benefit, from  
18 the contract. In so doing, the SDVOSB Defendants misled the  
19 Government into awarding the contracts to them.

20 ECF No. 36 at 33. In another part, the FAC alleges, without specifying any  
21 statements: “[The SDVOSB Defendants] lacked the necessary facilities, licenses,  
and technical expertise to manufacture or distribute these complex products. The  
SDVOSB Defendants knew all this, and in fact never intended to perform the  
contracts. Nevertheless, they falsely represented otherwise during the market  
research phase, the solicitation phase, and the performance phase. . . . Cardinal  
caused the SDVOSB Defendants to make these representations.” *Id.* at 21. Relator

1 further alleges, without any particularity: “Taking the contractors at their word, the  
2 Government relied upon their representations. In this way, the SDVOSB  
3 Defendants misled the Government into setting aside contracts. These false  
4 statements, and any records used to substantiate them, were material to false or  
5 fraudulent claims.” ECF No. 36 at 35.

6 In responding to the Motions to Dismiss, Relator directs the Court to a host of  
7 conclusory and unspecific allegations of wrongdoing by Defendants but does not  
8 direct the Court to specific statements or implicit representations that Relator  
9 maintains were fraudulent. *See* ECF No. 66 at 19–20 (portion of Relator’s response  
10 brief gathering citations and accompanying quotations from the FAC<sup>2</sup>).

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11 <sup>2</sup> Relator directs the Court to the following statements in the FAC: “*See* ¶ 50 (‘The  
12 SDVOSB Defendants made false representations ‘during the market research  
13 phase, the solicitation phase, and the performance phase.’); ¶ 55 (‘Defendants  
14 exploited Government contracting officers who were either unaware of who was  
15 actually performing the contract, unaware of the contractual requirements, unaware  
16 of the surrounding legal rules, or knowingly or recklessly assisting Defendants in  
17 violation of those requirements and rules.’); ¶ 92 (‘[T]he SDVOSB Defendants  
18 misled the Government into awarding the contracts to them’); ¶ 97 (‘When the  
19 Government conducted pre-solicitation market research and asked SDVOSBs  
20 whether they could perform the contracts to determine the appropriateness of an  
21 SDVOSB set aside, the SDVOSB Defendants told the Government that they could  
when they knew they could not,’ and the Government took ‘the contractors at their  
word’ and ‘relied upon their representations.’); ¶ 102 (‘When the SDVOSB  
Defendants were asked whether they would perform or were performing at least  
50% of the work under the contracts, they falsely answered affirmatively.’); ¶ 140  
(‘Instead of being honest, however, Defendants misrepresented and concealed that  
the ‘front companies’ did little if any of the work’); ¶ 158 (‘[T]he Government’s  
contracting officers were deceived by Defendants’).”

1           The Court finds that Relator’s vague allegations fall short of Rule 9(b)’s  
2 heightened particularity requirement. *See Vess v. Ciba-Geigy Corp. USA*, 317 F.3d  
3 1097, 1106 (9th Cir. 2003) (The allegations “must set forth more than neutral facts  
4 necessary to identify the transaction. The plaintiff must set forth what is false or  
5 misleading about the statement, and why it is false.”) (internal quotation omitted).  
6 Nor does the Court find sufficient particularity in Relator’s allegation that “every bid  
7 the SDVOSB Defendants submitted was . . . a false or fraudulent statement or record  
8 material to a false claim” because the bids allegedly contained “explicit or implicit”  
9 representations “that the SDVOSB Defendants were capable of performing contracts  
10 to provide radiopharmaceuticals to the Government, or were actually performing  
11 50% or more of the work under these contracts, or retaining 50% or more of the  
12 revenue[.]” ECF No. 36 at 34–35.

13           In short, the Court does not find specific allegations in the FAC that  
14 Defendants made explicit or implicit statements to conceal Cardinal Health’s role in  
15 the supply contracts. What is more, the Court does not find Relator’s digression into  
16 whether the supply contracts must legally have contained a subcontracting limitation  
17 relevant to whether Relator sufficiently pleaded fraud, because contractual  
18 requirements have no bearing on the truthfulness of Defendants’ statements or  
19 representations. *See United States ex rel. Berg v. Honeywell Int’l, Inc.*, 740 F.  
20 App’x 535, 537–38 (9th Cir. 2018) (affirming dismissal where proposals did not  
21 comply with governing regulations but were not false).

1 Defendants further dispute the plausibility of Relator's theory of liability with  
2 a plausible alternative explanation: "There was no conceivable way that the VA  
3 could conclude that either SDVOSB was capable of supplying the  
4 radiopharmaceuticals on its own. . . . And Relator's own pleadings show that the VA  
5 knew of Cardinal Health's involvement, yet awarded the contracts anyway." ECF  
6 No. 59 at 13, n. 1.

7 It is true that the FAC reflects that the VA was aware of Cardinal Health's  
8 involvement at the time that the VA awarded and paid claims on the contracts. *See*  
9 ECF No. 36 at 34–35. Considering the speculative nature of Relator's allegations of  
10 false statements, and Relator's acknowledgement that the SDVOSB Defendants at  
11 least partially disclosed Cardinal Health's role in supplying the contracted product,  
12 the Court does not find Relator's explanation that the VA relied on either explicit or  
13 implicit assurances by the SDVOSB Defendants that they independently could  
14 perform the contracts in accordance with all technical requirements to be plausible.  
15 *See In re Century Aluminum Co. Sec. Litig.*, 729 F.3d at 1108 ("When faced with  
16 two possible explanations, only one of which can be true and only one of which  
17 results in liability, plaintiffs cannot offer allegations that are 'merely consistent with'  
18 their favored explanation but are also consistent with the alternative explanation . . . .  
19 Something more is needed, such as facts tending to exclude the possibility that the  
20 alternative explanation is true . . . ." (internal citation omitted)). Accepting as true  
21 the factual allegations of the FAC, Defendants' "obvious alternative explanation" for

1 their behavior renders Relator's theory of liability implausible. *See Starr*, 652 F.3d  
2 at 1216; *Integra*, 854 Fed. Appx. at 844.

3 Therefore, the Court finds that the element of falsity has not been pleaded  
4 with sufficient particularity for purposes of Rule 9(b) and fails to meet the Rule 8  
5 standard requiring a "plausible claim for relief." Consequently, the Court grants  
6 dismissal of Relator's Counts I (presentment claim) and II (false statement claim),  
7 under 31 U.S.C. § 3729(a)(1)(A) and (B) on this basis.

#### 8 Materiality

9 A falsehood is material under the FCA if it has "a natural tendency to  
10 influence, or be capable of influencing, the payment or receipt of money or  
11 property." 31 U.S.C. § 3729(b)(4). The Supreme Court has held that the materiality  
12 standard is "demanding," and the FCA "is not an all-purpose antifraud statute, or a  
13 vehicle for punishing garden-variety breaches of contract or regulatory violations."  
14 *Escobar*, 135 S. Ct. at 2003. Furthermore, "if the Government pays a particular  
15 claim in full despite its actual knowledge that certain requirements were violated,  
16 that is very strong evidence that those requirements are not material." *Id.*

17 Relator's allegations are insufficient to survive Defendants' Motions to  
18 Dismiss as Relator's FAC concedes that the VA paid claims despite knowing that  
19 Cardinal Health was supplying radiopharmaceuticals through the VA contracts with  
20 the SDVOSB Defendants. *See* ECF No. 36 at 34 ("The SDVOSB Defendants  
21 sometimes mentioned Cardinal in their bids. For example, they may have included

1 Cardinal's NRC license, or identified Cardinal as a supplier."'). Again, whether the  
2 radiopharmaceutical supply contracts legally were required to contain, or even did  
3 contain, a subcontracting limitation ultimately is immaterial to the viability of  
4 Relator's FCA claims because the Court is not determining whether there was a  
5 breach of contract or a regulatory violation, only whether Relator sufficiently  
6 pleaded the claims in the FAC.

7 Relator does not sufficiently plead materiality because Relator alleges in the  
8 FAC that the VA had knowledge of the Cardinal Defendants' involvement at the  
9 time the contracts were formed and the VA still entered those contracts. *See*  
10 *Escobar*, 136 S. Ct. at 2003. In addition, the ongoing payment of claims by the VA  
11 after the Government declined to intervene in this case further supports a finding  
12 that Defendants' alleged wrongdoing was immaterial to the Government's  
13 performance of the contracts. *See* ECF Nos. 30 (Notice filed by the United States in  
14 May 2020); 36 (FAC filed in August 2020 alleging wrongdoing continuing through  
15 the present); *see also Escobar*, 136 S. Ct. at 2003–04.

16 Therefore, Relator did not adequately plead the materiality of Defendants'  
17 alleged wrongdoing, and the Court dismisses Relator's Counts I (presentment claim)  
18 and II (false statement claim), under 31 U.S.C. § 3729(a)(1)(A) and (B), on the basis  
19 of lack of materiality in addition to lack of falsity.

20 ///

21 ///

### Conspiracy

To proceed on a claim for civil conspiracy under the FCA, a relator must sufficiently allege “(1) that the defendant conspired with one or more persons to get a false or fraudulent claim allowed or paid by the United States and (2) that one or more conspirators performed an act to effect the object of the conspiracy.” *United States v. St. Luke’s Subacute Hosp. & Nursing Ctr., Inc.*, No. C 00-1976 MHP, 2004 U.S. Dist. LEXIS 25380, at \*15 (N.D. Cal. Dec. 15, 2004).

Because Relator’s conspiracy claim requires a viable underlying presentment or false statement claim, Relator’s conspiracy claim automatically fails alongside its other FCA claims based on Relator’s failure to allege falsity and materiality. *See* 31 U.S.C. § 3729(a)(1)(C) (imposing liability for conspiring to commit a violation of 31 U.S.C. §§ 3729(a)(1)(A), (B), or (G)). Therefore, the Court dismisses Relator’s Count III (conspiracy claim).

### ***Transfer of Venue***

In determining that Relator’s claims must be dismissed, the Court need not resolve the requests by the SDVOSB Defendants to transfer venue, which were made in the alternative to dismissal. *See* ECF Nos. 58 at 2; 61 at 2. However, the Court finds compelling the SDVOSB Defendants’ arguments to transfer this matter to a more convenient forum pursuant to 28 U.S.C. § 1404(a). The anticipated witnesses and underlying transactions did not occur in this District. *See* ECF No. 72 at 4. Moreover, the investigation by the United States Attorney’s Office in this

District, after Relator filed the case here, is a tenuous connection, as that work product could be transferred to another United States Attorney's Office without ethical implications. The Court will reserve ruling on a motion to transfer if and when it is properly noted before the Court.

***Without Prejudice***

Relator requests leave to file a Second Amended Complaint "unless amendment would be futile." ECF No. 66 at 68. Relator does not identify any potential amendments that may cure the deficiencies of the FAC. However, the Court cannot determine with certainty that future amendment would be futile. *See Swartz*, 476 F.3d at 761 (affirming district court's decision to dismiss with prejudice where amendment would be futile). Therefore, the Court will dismiss without prejudice.

Accordingly, **IT IS HEREBY ORDERED** that:

1. Defendants' Motions to Dismiss for Failure to State a Claim, **ECF Nos. 58, 59, and 61**, are **GRANTED**.

2. Relator's Amended Complaint is **dismissed without prejudice**, and a judgment of dismissal shall be entered accordingly.

**IT IS SO ORDERED.** The District Court Clerk is directed to enter this Order, provide copies to counsel, and **close the file**.

**DATED** September 29, 2021.

s/ Rosanna Malouf Peterson  
ROSANNA MALOUF PETERSON  
United States District Judge